RECORD AND BRIEF

No. 15-118

FILED
DEC - 9 2016
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JESUS C. HERNANDEZ, et al.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE AMNESTY INTERNATIONAL USA, THE CENTER FOR CONSTITUTIONAL RIGHTS, HUMAN RIGHTS FIRST, AND THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are international human rights organizations that engage in litigation, education, and advocacy to promote respect for and adherence to international human rights law and principles by all nations, including the United States. The Fifth Circuit's decision in this case eschewed the functional approach mandated by this Court in *Boumediene v. Bush*, 553 U.S. 723 (2008) in favor of a rigid, formalistic approach that fixated on the fortuity of the exact location of the victim of the cross-border shooting. Amici Curiae are concerned that the formalistic approach adopted by the Fifth Circuit runs counter to the United States' obligations under international law to provide a remedy for gross violations of human rights, including as in this case, extrajudicial killing, committed by its officials on the U.S.-Mexico border.

More detailed descriptions of the particular mission and interest of each Amicus Curiae are provided in Appendix A.

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[1] The parties have consented to the filing of this brief. In addition to Amici and their counsel, this brief was prepared with the assistance and financial support of Hope Metcalf, Diala Shamas, Brent Rosenthal, and the law firm of Rosenthal Weiner, LLP, Dallas, Texas. No other person or entity made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioners seek compensation for the killing of their son, fifteen-year-old Sergio Hernández, by Jesus Mesa, Jr., a U.S. Customs and Border Patrol agent. But for the fact that Hernández died some feet over the U.S.-Mexico border, there is little question that Mesa's actions would be subject to constitutional scrutiny and Petitioners would be eligible to seek an appropriate remedy. The Fifth Circuit, however, found that his presence on Mexican soil divested Hernández of any rights under the Constitution and absolved Mesa of any responsibility.

In reaching its conclusion, the Fifth Circuit relied on an overly narrow and outdated interpretation of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1994). That opinion, a plurality, must be read in light of the Court's further articulation in *Boumediene* of the extraterritorial application of constitutional rights. Justice Kennedy, in his concurrence in *Verdugo*, wrote that "we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." *Id.* at 277. *Boumediene*, authored by Justice Kennedy, held that "extraterritoriality turns on objective factors and practical concerns, not formalism," *id.* at 764, and stated that the appropriate inquiry is whether extraterritorial application of the constitutional provision would be "impractical and anomalous." *Id.* at 760 (quoting *Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring)).

While not strictly binding on the Court, international law and principles of comity are nonetheless instructive as to whether the extraterritorial recognition of constitutional rights would be "impracticable and anomalous." In *Boumediene*, for example, among the many factors leading to the Court's determination that "there are few practical barriers to the running of the writ," *id.* at 770, was the Court's conclusion that "[t]here is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government." *Id.* That decision stands in plain contrast with *Verdugo*, where a critical consideration was the fact that the actions involved Mexican officers within Mexican territory, where there existed no parallel to the Fourth Amendment's warrant requirement and no means to enforce it. *Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring) ("The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.").

In this case, as in *Boumediene*, "there is no indication" that providing a remedy here "would cause friction with the host government." *Boumediene*, 553 U.S. at 770. First, under settled international legal principles, extraterritorial jurisdiction is especially appropriate where, as here, the primary actions occurred on U.S. soil and by U.S. nationals. Second, defendants' conduct constitutes an extrajudicial killing, a *jus cogens*

violation and in plain violation of treaty obligations to which both the United States and Mexico have adhered. Finally, those same treaties obligate the United States to provide a remedy, particularly for gross human rights violations such as extrajudicial killing.

In sum, the Fifth Circuit's reading of *Verdugo* was misplaced; an examination of the very factors of comity present in both *Verdugo* and *Boumediene* lead to the opposite conclusion. Here, a U.S. official stood on U.S. soil and shot across the border and killed a Mexican national. The Mexican courts have proved unable to provide a remedy, as the United States has refused cooperation.[2] Without a remedy before a U.S. court, Petitioners will almost certainly be left without any recourse for the extrajudicial killing of their son, an outcome at odds with international treaty obligations by which both the United States and Mexico have agreed to be bound. Where, as here, the international legal backdrop to U.S.-Mexican relations recognizes both the underlying right to life and the appropriateness of extraterritorial jurisdiction, extension of the U.S. Constitution would be neither impracticable nor

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[2] Mexico requested extradition to pursue criminal charges against Mesa for Hernández's killing, but the United States refused. Marisela O. Lozano & Aaron Bracamontes, *Chihuahua Officials Seek Extradition of Border Agent in the '10 Shooting Death of Teenager*, El Paso Times, May 4, 2012, http://www.elpasotimes.com/ci_20544250/extradition-border-agent-sought; Adam Liptak, *An Agent Shot a Boy Across the U.S. Border: Can His Parents Sue?*, N.Y. Times, Oct. 17, 2016, http://nyti.ms/2eaxeMc.

anomalous. *See Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring).

ARGUMENT

International legal principles, which echo the practical approach employed in *Boumediene*, weigh heavily in favor of the modest extension of extraterritoriality presented by this case.[3] Like *Boumediene*, international tribunals have moved away from formalistic approaches to the application of extraterritorial jurisdiction.[4] The European Court of Human

[3] For a more detailed analysis of the interplay between the Court's extraterritoriality jurisprudence and international law principles and human rights norms, *see* Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE INT'L L. J. 308 (2011).

[4] *The 'Lotus' (France v. Turkey)*, P.C.I.J. (ser. A) No. 10 (1927) ("Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain areas by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."). *See also Bankovic v. Belgium*, App. No. 52207/99, Eur. Ct. H.R. (Dec. 12, 2001) ("While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States. . . ."). Since *Bancovic*, jurisprudence from the European Court of Human Rights has moved decidedly in the direction of a functional analysis, even where the alleged violations occurred in the context

Rights has explained its approach to extraterritoriality as follows:

> A state may be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter States. . . . Accountability in such situations stems from the fact that . . . the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.
>
> *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. (2004), ECHR 629, ¶ 71.

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of military operations overseas. *Jaloud v. The Netherlands*, App. No. 47708/08, Eur. Ct. H.R. (2014) (extending jurisdiction under the Convention to Dutch authorities who killed an Iraqi national at a checkpoint); *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. (2004) (setting forth test for extraterritoriality but declining to extend jurisdiction to Turkey's alleged violations in Iraq because there was insufficient "factual basis for holding that, at the relevant time, the victims were within that specific area" where Turkey had effective control); *Ilascu v. Moldova and Russia*, App. No. 48787/99, Eur. Ct. H.R. (2004) (holding that Russian officers violated Article 3's prohibition of torture by arresting complainants on foreign territory and handing them over to foreign authorities despite the knowledge that they would be tortured). For a general overview of the extraterritorial application of the European Convention of Human Rights and other international human rights law instruments, *see* M. Milanović, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (Oxford, Oxford University Press, 2011).

The extraterritoriality principle has been codified into a number of international agreements, which explicitly call for extraterritoriality. For example, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment mandates that "[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction" when the torture was "committed in any territory under its *jurisdiction*" or "[w]hen the alleged offender is a *national* of that State." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, art. 5(b) (adopted Dec. 10, 1984, entered into force Jun. 26, 1987) 1465 U.N.T.S. 112; 'CAT') (emphasis added). Contrast with *id.* at art. 5(1)(c) ("When the victim is a national of that State *if that State considers it appropriate*") (emphasis added).

This evolution is particularly notable as to core human rights obligations, even where the acts and the injuries occurred outside sovereign territory and in the course of military activities. In *Al-Skeini v. United Kingdom*, the surviving family members of Iraqis killed by British soldiers in 2003 brought suit under the European Convention of Human Rights.[5] There, the European Court of Human Rights held that "the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the

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[5] *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. (2001).

deceased and the United Kingdom. . . ." *Id.* at ¶ 149. Or, in the words of Judge Bonello in his concurrence: "Jurisdiction flows not only from the exercise of democratic governance. . . . It also hangs from the mouth of a firearm. In non-combat situations, everyone in the line of fire of a gun is within the authority and control of whoever is wielding it." *Id.* at ¶ 28 (Bonello, J., concurring).

The Inter-American Commission on Human Rights (IACHR) is particularly instructive of extraterritoriality in this matter, given the participation of both the United States and Mexico in the Organization of American States. The Commission has held that "the American Declaration protects the rights of all human beings under a Member State's jurisdiction," which, in turn, means "subject to [a state's] authority and control." Under the Commission's jurisprudence, "control" by a state over a victim is established "usually through the acts of the [state]'s agents abroad." *Coard v. United States*, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99 OEA/Ser.L./V/II.106 doc. 6 rev. (1999).[6] In

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[6] For instances of the Commission's general treatment of extraterritorial state conduct under the terms of its Statute and the American Declaration, *see generally Coard*, at ¶¶ 9-10; Inter-Am. Comm'n H.R., Report on the Situation of Human Rights in Chile, OEA/Ser.L./V/II.66 doc. 17 (1985) (referring to Letelier assassination in Washington, D.C.); Inter-Am. Comm'n H.R., Second Report on the Situation of Human Rights in Suriname, OEA/Ser.L./V/II.66 doc. 21, rev. 1 (1985) (addressing allegations that Surinamese citizens residing in Holland had been harassed and/or attacked by agents of Suriname); *Panamanian Victims v. United States*, Case 10.573, Inter-Am. Comm'n H.R., Report No.

Coard, the Commission examined allegations that U.S. officials had unlawfully detained petitioners during U.S. military operations in Grenada in 1983. The Commission found that the United States' obligations under the American Declaration applied because "the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control." *Id.* at ¶ 37; *see also Alejandre Jr. v. Cuba*, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L./V/II.106 doc. 6 rev. at ¶ 23 (1999) (finding that Cuba's obligations under the American Declaration extended to four civilians who were killed when Cuban military shot down two civilian aircraft in international airspace).

Here, the "jurisdictional link" is more straightforward than in *Al-Skeini* or *Coard*. Settled bases for prescriptive jurisdiction under the Restatement of Foreign Relations include "conduct that, wholly or in substantial part, takes place *within its territory*" and "the activities, interests, status, or relations *of its nationals* outside as well as within its territory." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402 (1987) [hereinafter RESTATEMENT] (emphasis added). The Restatement lists a multitude of factors relevant to whether the exercise of prescriptive

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31/93 OEA/Ser.L./V/II.85 doc. 9 rev. (1994) at 312 (admitting a case concerning actions of United States forces in Panama).

jurisdiction is "unreasonable" when there are competing ties between states and the underlying activity or person. Among those factors are:

> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place *within the territory*. . . . ;
>
> (b) the connections, such as *nationality*, residence, or economic activity, between the regulating state and the *person principally responsible for the activity to be regulated*. . . . ;
>
> (c) the *character of the activity to be regulated*, the importance of regulation to the regulating state, the extent to which *other states regulate such activities*, and the degree to which the desirability of such regulation is *generally accepted*;
>
> (d) the existence of *justified* expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the *international political, legal*, or economic system;
>
> (f) the extent to which the regulation is *consistent with the traditions of the international system*;
>
> (g) the extent to which another state may have an interest in regulating the activity; and

(h) the *likelihood of conflict* with regulation by another state.

Id. at § 403 (emphasis added).

These factors, while by no means binding on the Court, illuminate *Boumediene*'s functional analysis and overwhelmingly weigh in favor of extraterritoriality in this case. As a preliminary matter, the critical activity – the shooting – happened "within the territory" of the United States, and the "person[s] principally responsible for the activity to be regulated" are U.S. nationals. *Id.* at § 403(a), (b).

Second, there exists no credible conflict between the United States and Mexico over the legality of extrajudicial killing. The right to life is enshrined in the founding documents of international human rights, to which both the United States and Mexico have adhered. Universal Declaration of Human Rights ("UDHR"), adopted Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), art. 3 ("Everyone has the right to life, liberty, and security of person."); International Covenant on Civil and Political Rights ("ICCPR"), art. 6, 999 U.N.T.S. 171 (Dec. 16, 1966). Under the American Declaration of Human Rights, signed by both the United States and Mexico, "[e]very human being has the right to life, liberty and the security of his person." Decl. art. 2; IACHR art. 4 ("No one shall be arbitrarily deprived of his life."). Given the ultimate and irreversible nature of death, "[t]he deprivation of life by the authorities of the State is a matter of utmost

gravity." U.N. Human Rights Comm., General Comment No. 6, ¶ 3, U.N. Doc. HRI/Gen/1 (1982). Thus, extrajudicial killing is one of only a handful of violations that the Restatement defines as *jus cogens* norms. RESTATEMENT § 702 (1987) (listing murder alongside genocide, enforced disappearance, torture, slavery, slave trading, and prolonged arbitrary detention).[7]

Nor is there any genuine conflict over whether the plaintiffs in this case are entitled to a remedy for their son's death. The United States and Mexico have both acceded to the ICCPR, which requires the government to "ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy." ICCPR, art. 2(3). That obligation includes the duty to "provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law."

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[7] Law enforcement officers may use deadly force only as a last resort and where doing so is necessary to protect life. *See* Restatement § 702, comment f (1987) ("It is a violation of international law for a state to kill an individual other than as lawful punishment pursuant to a conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officers in line of duty in defense of themselves or other innocent persons, or to prevent serious crime."). *See also* Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, U.N. Doc. A/CONF.144/28/Rev.1 (1990); *McCann and Others v. The United Kingdom*, Eur. Ct. H.R. (ser. A) No. 324 (1995); *Suárez de Guerrero v. Colombia*, U.N. Human Rights Comm'n, Commc'n No. 45/1979 (1982).

Basic Principles and Guidelines on the Right to a Remedy and Reparation, U.N. General Assembly, Resolution 60/47 (Dec. 16, 2005) art. IX, ¶ 15.[8]

The Inter-American human rights system has articulated a more detailed set of requirements. Both the Declaration, which the United States has signed, and the Convention, which the United States has not ratified, provide for a robust right to remedies.[9] The Declaration states that "[e]very person may resort to the

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[8] The term "gross violations of human rights" does not have a set definition under international law, but the U.S. Congress has defined that term in the context of determining when foreign aid must be denied to a given country. For that purpose, "gross violations of internationally recognized human rights" "include[] torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person." 22 U.S.C. § 2304.

[9] As noted above, although the United States is not a party to the Convention, the Commission's jurisprudence nonetheless sets forth the United States' obligations under the Declaration. Under Inter-American jurisprudence, the right to a remedy under the Declaration and the Convention are similar in scope and should be read in tandem. *See Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L./V/II.122 doc. 5 rev. 1 ¶ 174 (2004), at 727, ("The right to judicial protection acknowledged by Article XVIII of the American Declaration is affirmed in similar terms by Article 25 of the American Convention on Human Rights, with regard to which the Inter-American Court of Human Rights has stated.)"; *see also Maria da Penha v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L./V/II.111 doc. 20 rev. ¶ 37 (2001). The Commission's practice has frequently been to apply its Convention jurisprudence to its interpretation of parallel Declaration provisions. *See, e.g.*, Inter-Am. Comm'n H.R.,

courts to ensure respect for his legal rights." The Convention further expounds on the obligations in the Declaration. It provides that:

> "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

To that end, the Convention requires that States "ensure that any person claiming such remedy shall have his rights determined by the competent authority" and "develop the possibilities of judicial remedy." Art. 25. Legal recourse is "ineffective" if it does not "recognize the violation of rights," "protect the applicants in the rights affected," and "provide adequate reparation."[10]

In sum, where, as here, an action concerns a *jus cogens* violation and the international legal backdrop

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Report on Terrorism and Human Rights, OEA/Ser.L./V/II.116 doc. 5 rev. ¶ 50 (2002) (noting that "derogation criteria derived from the American Convention on Human Rights embody the Hemisphere's deliberations on the issue and are properly considered and applied in the context of the Declaration"). Indeed, the Commission has referred to the right to remedy as the "object and purpose" of the American Declaration, following the basic principle that to every right there is a remedy. *See Chad Roger Goodman v. Bahamas*, Case 12.265, Inter-Am. Comm'n H.R., Report No. 78/07, OEA/Ser.L./V/II.130 doc. 22 rev. 1 ¶ 61 (2007).

[10] *The Mayagana (Sumo) Awas Tingni Community Case*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 104 (Aug. 31, 2001).

recognizes the appropriateness of extraterritorial jurisdiction, extension of the U.S. Constitution in this limited circumstance would be neither impracticable nor anomalous. *See Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring).

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court reverse and remand.

Respectfully submitted,

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APPENDIX
(LIST OF AMICI CURIAE)

Amnesty International USA is the largest country section of Amnesty International, a worldwide human rights movement with a presence in over 70 countries and the support of 7 million people throughout the world. Amnesty International works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated.

The Center for Constitutional Rights ("CCR") is a national nonprofit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. In 2002, CCR filed the first *habeas corpus* petitions on behalf of foreign nationals detained by the Executive at the U.S. Naval Station at Guantánamo Bay, Cuba, and served as counsel in *Rasul v. Bush*, 542 U.S. 466 (2004) and *Boumediene v. Bush*, 553 U.S. 723, 769 (2008). CCR has also submitted amicus curiae briefs in cases in this Court concerning domestic and international law standards governing U.S. treatment and detention of foreign nationals and the jurisdiction of U.S. courts to hear claims raising international law violations. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v.*

Padilla, 542 U.S. 426 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

Human Rights First is a nonprofit, nonpartisan international human rights organization based in New York and Washington, D.C. Since 1978, Human Rights First has worked to protect fundamental human rights. It promotes laws and policies that advance universal rights and freedoms and exists to protect and defend the dignity of each individual through respect for human rights and the rule of law.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its president, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because it is greatly concerned about, and seeks to defend, the safety and security of all individuals, regardless of their nationality, from abuses of power at the hands of the government.